PUBLICATION

NLRB Finds That Writing "BLM" on an Employee Uniform is Protected by the NLRA

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In a case issued on February 21, 2024, the National Labor Relations Board (NLRB or the Board) has continued its expansion of the definition of "protected, concerted activity" under Section 7 of the National Labor Relations Act (NLRA), applying that concept to certain speech and activities by employees that is not directly related to terms and conditions of employment, but to social movements and other political activity.

In this landmark new decision, which arose at a retail store, the Board reversed an administrative law judge's conclusion that an employee's writing "Black Lives Matter" (BLM) on their apron was *not* protected, concerted activity under the NLRA because it did not relate directly to terms and conditions of employment and because the display of the term "BLM" did not implicate concerted (or group) action among employees. In reversing the judge, the Board found that the employee's BLM insignia was a "logical outgrowth" of concerted activity relating to allegations of racism at the employer's store that occurred close in time to the BLM incident. The Board also found that the employer ran afoul of recent NLRB cases narrowing employers' right to restrict certain protected insignia (such as union buttons). The holding in this case is relevant to all businesses, including nonunion employers.

Protected, Concerted Activity

Section 7 of the NLRA protects employees' right to engage in concerted (as opposed to merely individual) activities for the purpose of "mutual aid or protection" in the workplace. This section of the law is, of course, relevant to employees engaging in union organizing activity, but it also protects a wide swath of activity unrelated to unions or union organizing. For employee activity to be protected under this legal doctrine, two things must be present: (1) there must be at least two employees involved – whether that's two or more employees banding together to bring about change in the workplace or a single employee bringing a concern on behalf of other employees; and (2) the subject of the discussion or activity must relate to employees' working conditions.

To illustrate how this doctrine works, imagine that a single employee complains to management about her schedule, saying that the employer's scheduling system is unfair. This complaint would not be protected unless the employee could show that she had discussed the scheduling practices with other employees, with an eye toward urging the employer to change those practices. This would be an individual concern, and Section 7 therefore would not be implicated. Similarly, if a group of employees got together and walked into a manager's office to complain about the color that the employee break room was painted, Section 7 also wouldn't come into play. In this example, although there was employee activity that was unquestionably concerted, the subject of the concerted activity did not bear directly on employees' terms and conditions of employment. However, imagine that the employees got together and complained that the employee break room was unsanitary or unsafe. That complaint *would* be protected under Section 7 because the uncleanliness or unsafe conditions present in the workplace concern employees' working conditions.

An exception to the above rules is when an individual action is a "logical outgrowth" of prior protected, concerted activity. Take the example above involving an employee's complaint about her schedule. Imagine that one week before the employee raised the individual scheduling complaint, a group of employees at an all-

employee meeting raised concerns with management about the fairness of the employer's scheduling system, suggesting that the employer should consider changing it. In this context, the NLRB might well find the employee's individual schedule complaint to have been concerted because it is a logical outgrowth of earlier concerted activity.

The NLRB historically has found that political activity or social activism does not implicate Section 7 of the NLRA, because it concerns matters outside of the workplace rather than employees' terms and conditions of employment.

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In this case, the store at issue was located in the Minneapolis area, not far from where George Floyd was killed by police. An employee, Morales, started working at the store in August 2020, a few months after that tragedy. In support of the protests that were happening both in Minneapolis and nationally, Morales wrote "BLM" on his employer-issued apron. He did this in about September 2020. Several other employees also took it upon themselves to adorn BLM on their aprons. Also around that time, Morales noticed that a coworker, Gumm, displayed racial insensitivity toward customers. Morales discussed this issue with coworkers and later observed Gumm engaging in similar behavior toward co-workers. Morales and other employees complained to management about this. In February 2021, they erected a Black History Month display which was shortly thereafter defaced. Morales and other employees raised another complaint with management.

Managers met with Morales and had a lengthy discussion about Gumm's inappropriate behavior toward both customers and co-workers, as well as the defacement of the Black History Month display. About halfway through the meeting, the managers turned their attention to the BLM written on Morales's apron, noting that the employer preferred that Morales not display BLM (or other political or social) insignia in the workplace. They noted that the BLM adornment violated the employer's dress code policy, which said that the employer's stores were "not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters." The managers let Morales know that he would not be permitted to come to work in the future with BLM written on his apron. Morales chose to resign, and he then filed a charge with the NLRB.

The Board rejected the administrative law judge's conclusion that Morales's adornment of BLM on his apron was unprotected because it was related to a social activism movement and not to working conditions. The employer argued (and the judge concluded) that although Morales's communications with coworkers and complaints to management about racism were protected, the BLM insignia was not related to that activity. Indeed, Morales wrote BLM on his apron just after he started his job and well before his protected discussions and complaints occurred. The Board majority found, however, that the relevant act was Morales's refusal to remove BLM from his apron following the meeting with management, which occurred just before he resigned. The Board also found that the employer unlawfully applied its dress code rule in a way that interfered with Morales's protected, concerted activity. The Board ordered that Morales be reinstated to his job, with full back pay.

One of the Board members filed a dissenting opinion, pointing out that the NLRB's decision in this case was an "unprecedented" expansion of the "logical outgrowth" rule, especially when taking into consideration that the BLM adornment occurred on an individual basis, and actually occurred before Morales engaged in protected, concerted activity. The dissenting member also pointed out that the BLM insignia would not reasonably be viewed by customers as protesting working conditions, due to BLM's broad (and sometimes diverging) political goals, which are not related to the workplace. Indeed, the store was located just a few miles from where the George Floyd tragedy occurred and this was all happening just a few months after those events. An employee, the dissenting Board member noted, would view Morales's BLM insignia as support for a social movement, not a workplace protest.

What Should You Do Now?

Many employers have a preference (and indeed, some have policies) against employees engaging in charged political speech in the workplace. This new decision from the NLRB complicates that somewhat. Does this mean that any and all political speech and social commentary are now protected by the law? No. However, it is no longer true that political speech, as a rule, is not protected.

1. Is there any connection between the speech and working conditions?
2. If so, how strong is the connection between the speech and the workplace?
3. Does the speech or activity relate to concerns or issues raised by employees?
4. Have employees engaged in discussion over that subject? If so, what was the nature of those discussions?

When in doubt, employers are best served by consulting with a traditional labor attorney.

Employers may wonder whether their policies restricting political speech in the workplace are now unlawful. The NLRB did not address that question in this case, because the trial was held before the Board issued its decision in *Stericycle, Inc*., 372 NLRB No. 113 (2023). That case significantly lowered the bar for a finding that a work rule is overbroad because employees might read it to interfere with their Section 7 rights. While the Board did not address such policies in *Stericycle*, it is quite possible that it would find that a rule restricting political speech violates the NLRA. Given an employer's particular circumstances and business reasons for needing to restrict political speech or activity, such a rule might be upheld – but this will depend on the factual circumstances.

This decision is another in a recent spate of cases broadening the type of conduct that is protected by the NLRA. If you have questions about these recent developments, contact Cassandra L. Horton or any member of Baker Donelson's Labor & Employment Team.